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Cover Page Footnote

J.D. Candidate, May 2014, The Catholic University of America, Columbus School of Law; B.A., 2010, University of Richmond. The author would like to thank Prof. George P. Smith, II for his friendship, support, and invaluable insights, Prof. Kathryn Kelly for her wealth of tort law knowledge, and the wonderful staff and editors of the Catholic University Law Review for their hard work and thoughtful edits. Finally, to Anne, this is for you—thanks for everything.

OF TREES, VEGETATION, AND TORTS: RE-CONCEPTUALIZING REASONABLE LAND USE

Daniel Bidwell⁺

“I think that I shall never see/A poem lovely as a tree”

- Joyce Kilmer, *Trees* (1914)¹

In the early morning hours of October 19, 2011, an athlete was killed when an elm tree branch snapped and fell on him as he jogged through Washington, D.C.² In March of 2012, a woman in Portland, Oregon was injured by a 150-foot tree that had succumbed to root fungus and toppled on top of her as she walked by.³ Similarly, in Manhattan’s Stuyvesant Square Park, a twenty-nine-year-old social worker was trapped under a rotting tree branch, which had fallen from thirty feet and crushed her arm.⁴ As these incidents partially illustrate, reports of dead or decaying trees injuring people are all-too common occurrences.⁵ However, the law is often conflicted in how it provides

⁺ J.D. Candidate, May 2014, The Catholic University of America, Columbus School of Law; B.A., 2010, University of Richmond. The author would like to thank Prof. George P. Smith, II for his friendship, support, and invaluable insights, Prof. Kathryn Kelly for her wealth of tort law knowledge, and the wonderful staff and editors of the *Catholic University Law Review* for their hard work and thoughtful edits. Finally, to Anne, this is for you—thanks for everything.

1. JOYCE KILMER, *TREES AND OTHER POEMS* 19 (1914).

2. Scott McCabe, *Jogger Killed After Branch Falls in Mount Pleasant*, WASHINGTON EXAMINER (Oct. 19, 2011), <http://washingtonexaminer.com/jogger-killed-after-branch-falls-in-mount-pleasant/article/149734>.

3. *Woman Healing After Portland Tree Falls on Her*, KGW (Mar. 22, 2012, 6:30 PM), <http://www.kgw.com/news/Large-tree-falls-in-Portlands-park-blocks-143737486.html>.

4. William Glaberson & Lisa W. Foderaro, *Neglected, Rotting Trees Turn Deadly*, N.Y. TIMES, May 14, 2012, at A1.

5. See, e.g., Brianne Betts, *Large Tree Falls, Kills 6-Year-Old Girl*, NBC4I (Aug. 31, 2012, 4:28 PM), <http://www.nbc4i.com/story/20747781/large-tree-falls-kills-6-year-old-girl>; *Driver Killed by Falling Tree in Great Falls*, NBC WASHINGTON (July 18, 2012, 8:56 PM), <http://www.nbcwashington.com/news/local/Woman-Killed-by-Falling-Tree-in-Great-Falls-162801906.html>; *Falling Tree Injures Accord Motorist*, DAILY FREEMAN (May 1, 2012), <http://www.dailyfreeman.com/articles/2012/05/01/blotter/doc4f9f3a66eef7f328940029.txt>; *Huge Tree Falls on Woman, Girl in Santa Ana*, CBS LOS ANGELES (Mar. 19, 2012, 10:43 PM), available at <http://losangeles.cbslocal.com/2012/03/19/huge-tree-falls-on-woman-girl-in-santa-ana/>; *Rangers Identify Two Killed by Falling Trees in Smokies*, WBIR (July 6, 2012, 5:58 PM), <http://www.wbir.com/news/local/story.aspx?storyid=225733>. A high-profile example of the danger posed to neighboring landowners by trees is the pending litigation filed by husband and wife, Eric Dane and Rebecca Gayhart, the star of the television series *Grey's Anatomy*, against their neighbor, Billy Corgan, the lead singer of the rock group “Smashing Pumpkins.” *Smashing Pumpkins' Billy Corgan Responds to Eric Dane, Rebecca Gayheart 'Tree' Lawsuit*, HOLLYWOOD REPORTER (Oct. 2, 2012, 12:57 PM), <http://www.hollywoodreporter.com/news/eric-dane-rebecca-gayheart-sue-billy-corgan-375868>. Dane and Gayheart are suing Corgan for nuisance and negligence after a large eucalyptus tree fell from his property onto their house, causing substantial damage. *Id.*

compensation to those persons injured by trees.⁶ Interestingly, although tree-induced harm is relatively commonplace, there is but scattershot case law on where the liability for such injuries falls.⁷

The Supreme Court of Virginia's decision in *Cline v. Dunlora South, LLC* provides a recent example of a way courts have addressed assigning liability in personal injury cases arising from falling trees.⁸ The court's discussion in *Cline* is best understood when situated within the precedential framework in which it occurred. Since Virginia courts first addressed hazards posed by trees in 1939, courts have followed two successive rules, first, the Virginia Rule, established by *Smith v. Holt*,⁹ and, later, the Hawaii Rule, adopted in *Fancher v. Fagella*, which overruled *Smith*.¹⁰ In 2012, when *Cline* came before the Virginia Supreme Court, the rule followed by Virginia courts gave injured plaintiffs access to legal remedies under the theory that trees could constitute a nuisance when they caused actual harm or posed the threat of imminent harm.¹¹

In *Cline*, the Supreme Court of Virginia considered a personal injury suit that arose when a motorist was injured by a dead or decayed tree that fell on his car as he drove down a central Virginia highway.¹² Although the motorist could have presented evidence that the owner of the land on which the tree stood knew or should have known the hazardous condition posed by the tree, the circuit court dismissed the suit.¹³ In considering when and how to impose liability on landowners when their trees harm others, both the majority and the dissent in *Cline* relied on the doctrine of *sic utere tuo ut alienum non laedas* (hereinafter "*sic utere*"), which "precludes use of land so as to injure the property of another."¹⁴ This doctrine determines both what the law should expect of landowners and when aggrieved parties may seek judicial redress for their injuries.¹⁵

6. See *infra* Parts I-II.

7. See *Taylor v. Olsen*, 578 P.2d 779, 780 n.1 (Or. 1978) ("This court has not previously had occasion to consider the question of liability for injuries caused by the fall of roadside trees. However, such injuries have long been common enough to develop lines of cases in other jurisdictions.").

8. 726 S.E.2d 14, 15 (Va. 2012).

9. 5 S.E.2d 492, 496 (Va. 1939) overruled by *Fancher v. Fagella*, 650 S.E.2d 519, 522 (Va. 2007). The Virginia Rule provided that self-help was a plaintiff's only remedy, unless the tree in question was "noxious." *Fancher*, 650 S.E.2d at 521.

10. *Fancher*, 650 S.E.2d at 522. The Hawaii Rule provides broader circumstances for recovery, allowing a plaintiff to potentially recover when a tree becomes a nuisance that causes actual, or imminent danger of, harm to property. *Id.* at 521.

11. *Id.* at 522 (quoting *Lane v. W.J. Curry & Sons*, 92 S.W.3d 355, 364 (Tenn. 2002)).

12. 726 S.E.2d at 15-16.

13. *Id.* at 15-16.

14. *Id.* at 17, 19 (translating the Latin phrase as "one must so use his own rights as not to infringe upon the rights of another").

15. See Daniel R. Coquillette, *Mosses From An Old Manse: Another Look at Some Historic Property Cases About the Environment*, 64 CORNELL L. REV. 761, 772-73, 776 (1979).

Part I of this Comment provides a substantial background of the law governing land use, specifically, as it concerns vegetation that grows on private land. The law in this field is derived from the common-law doctrine of *sic utere* and classic English cases.¹⁶ These cases discuss a landowner's liability for injuries caused by his trees and apply the classic maxim of *sic utere* by treating the maxim as a landowner's essential duty.¹⁷ Part II surveys the various approaches that courts have taken to resolve questions of reasonable land use in the context of encroaching vegetation cases.¹⁸ Part II also analyzes the factors that courts are implicitly weighing in choosing between the various encroaching vegetation rules, and then examines the *Cline* majority opinion, the three-justice dissent, and the tension between the two. Finally, Part III argues that the dissent correctly determined what the standard of care, as applied to landowners whose land contains dead or decaying trees that pose a threat to adjacent landowners or motorists on public highways abutting their land, should be.

I. TREES, SIC UTERE, AND LIABILITY: UNWORKABLE ANALYSES

There is a surprising dearth of case law concerning a landowner's duty to act reasonably with respect to his or her trees.¹⁹ But the cases that do speak to this

(explaining that the Sir Edward Coke set forth the rule of *sic utere tuo ut alienum non laedas* in *William Aldred's Case* in rejecting allegations that "social utility justified some interferences" and holding that there was "an absolute right to enjoyment of certain property rights," but "[giving] the court some discretion to determine the nature of those rights.") (citations omitted); see also George P. Smith, II, *Nuisance Law: The Morphogenesis of an Historical Revisionist Theory of Contemporary Economic Jurisprudence*, 74 NEB. L. REV. 658, 680 (1995) [hereinafter Smith, *Nuisance Law*] (stating that "the principle [of *sic utere*] tests when a defendant's conduct is unreasonable or invasive of a plaintiff's rights, not when it fails a test shaped and directed by social costs or benefits" thereby placing proper emphasis on balancing of reasonable and unreasonable behaviors) (citations omitted); Lawrence H. White, *Economics and Nuisance Law: Comment on Manson*, 8 HARV. J.L. & PUB. POL'Y 213, 214 (1985) (asserting that *sic utere* is useful in defining the inquiry in a nuisance case by directing the court to determine what the plaintiff's rights are and whether they have been violated and by dictating that the defendant's conduct "is 'unreasonable' when it invades the plaintiffs' rights, not when it fails a social cost benefit test."); *infra* notes 20, 140 and accompanying text.

16. See, e.g., *William Aldred's Case*, (1611) 77 Eng. Rep. 816 (K.B.) 821; *St. Helen's Smelting Co. v. Tipping*, (1865) 11 Eng. Rep. 1483 (H.L.) 1487; *Crowhurst v. Amersham Burial Bd.*, (1878) 4 Exch. Div. 5 at 11 (Eng.); *Dalton v. Angus*, (1881) 6 App. Cas. 740 (H.L.) at 780.

17. See *infra* note 20 and accompanying text.

18. See, e.g., *Bliss v. Ball*, 99 Mass. 597, 598 (1868) (addressing shade from trees); *Ken Cowden Chevrolet, Inc. v. Corts*, 316 N.W.2d 259, 260-61 (Mich. App. 1982) (assessing an overgrown field); *Lane v. W.J. Curry & Sons*, 92 S.W.3d 355, 356 (Tenn. 2002) (analyzing encroachment by tree branches and roots); *Smith v. Holt*, 5 S.E.2d 492, 493 (Va. 1939) (considering encroaching branches and roots) *overruled by Fancher v. Fagella*, 650 S.E.2d 519, 522 (Va. 2007).

19. See *supra* note 7.

issue tend to be resolved using the common-law maxim *sic utere*.²⁰ The maxim of *sic utere* is an incredibly broad grant of liberty to a property owner provided that he satisfy his basic duty to others.²¹

A. Negligence in Modern Tort Law

Many of the personal injury claims concerning dead or decaying trees are brought as nuisance or negligence suits.²² In order to satisfy the *prima facie* case for negligence a plaintiff must prove that the defendant owed the plaintiff a duty, failed to act on that duty, and that this failure was both the “but-for,” and the proximate, cause of a harm which befell the plaintiff.²³ In suits concerning trees, the dispute hinges on whether the defendant was under any obligation to make sure that his tree did not injure the plaintiff.²⁴

20. See *Arminius Chem. Co. v. Landrum*, 73 S.E. 459, 465 (Va. 1912) (noting that the *sic utere* rule “is almost equal to the Golden Rule in importance, and must never be lost sight of in the daily doings and transactions of organized society.”); see also *Brandywine Hundred Realty Co. v. Cotillo*, 55 F.2d 231, 231 (3d Cir. 1931) (resolving a property dispute by applying the doctrine of *sic utere* and finding that reasonable use is “one of the burdens of [property] ownership” especially with respect to maintaining responsibly land which abuts public highways); *Thurston v. Hancock*, 12 Mass. 220, 224 (1815) (holding that *sic utere* is “a common principle of the civil and of the common law, that the proprietor of land, unless restrained by covenant or custom, has the entire dominion, not only of the soil, but of the space above and below the surface, to any extent he may choose to occupy it. . . . [so] as not to injure the property or impair any actual existing rights of another.”); *Hay v. Norwalk Lodge No. 730*, B.P.O.E., 109 N.E.2d 481, 484 (Ohio Ct. App. 1951) (exploring the topic of reasonable land use through a *sic utere* paradigm, although without referencing the aforesaid maxim, the court explained that “the law does impose upon every member of society the duty to refrain from conduct of a character likely to injure a person with whom he comes in contact and to use his own property in such a manner as not to injure that of another”) (citations omitted); *Burwell v. Hobson*, 53 Va. 322, 325 (1855) (“The maxim *sic utere tuo ut alienum non laedas* emphatically applies to the case of a riparian proprietor, and is the true legal as well as moral measure of his rights. He has no right to divert the stream, or any part of it, from its accustomed course, to the injury of other persons.”).

21. See *supra* notes 15, 20.

22. See, e.g., *Dudley v. Meadowbrook, Inc.*, 166 A.2d 743, 744 (D.C. App. 1961) (finding a plaintiff made out a *prima facie* case for negligence when a tree fell and damaged his property); *Cline v. Dunlora South, LLC.*, 726 S.E.2d 14, 15 (Va. 2012) (affirming a plaintiff’s nuisance claim resulting from a tree falling on his car).

23. See, e.g., *Thornton v. F.J. Cherry Hosp.*, 644 S.E.2d 369, 376 (N.C. Ct. App. 2007) (citation omitted); *Warnick v. Home Depot U.S.A., Inc.*, 516 F.Supp.2d 459, 465 (E.D. Pa. 2007); *Burdette v. Marks*, 421 S.E.2d 419, 420 (Va. 1992). The elements for a negligence claim are: duty, breach, causation, and damages. See, e.g., *Thornton*, 644 S.E.2d at 376; *Warnick*, 516 F.Supp.2d at 465.

24. See, e.g., L.M. Anderson & Thomas A. Eaton, *Liability for Damage Caused by Hazardous Trees*, 12 J. OF ARBORICULTURE 189, 190 (1986) (tracing the progression from landowners having no duty to protect others from dangerous trees on their land to the recent years in which landowners must mitigate natural hazards and remove the defective trees that they have actual knowledge of); John C. P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657, 660 (2001) (explaining that courts usually recognize a defendant’s duty to the plaintiff to be liable for the harm caused by his negligent conduct).

B. English Common Law

A set of English common-law cases provide a useful background in situating modern American case law on damage done by trees. The older English common-law cases most useful in the study of *Cline* and the danger of trees are those that discuss premises liability and the legal distinction between artificial and natural uses of the land.²⁵ The most significant English case on premises liability is *Fletcher v. Rylands*.²⁶ In *Fletcher*, the defendants negligently maintained a reservoir that they had constructed on their land, allowing water to escape and flood the plaintiff's mine.²⁷ The court held that the defendant owed a duty of reasonable care to the plaintiffs because the reservoir was artificial.²⁸ The court set forth a frequently cited rule regarding the duty of a landowner in reference to artificial conditions:

We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape.²⁹

25. See, e.g., *Rylands v. Fletcher*, (1868) 3 L.R.E. & I. App. 330 (H.L.) 339 (Lord Cairns L.C.) (appeal taken from L.R. Exch.) (Eng.) (holding that a landowner undertakes a "non-natural use . . . at their own peril").

26. See (1866) 1 L.R. Exch. 265 at 277 (Blackburn, L.J.) (Eng.); see also FREDERICK POLLARD, *THE LAW OF TORTS: A TREATISE ON THE PRINCIPLES OF OBLIGATIONS ARISING FROM CIVIL WRONGS IN THE COMMON LAW* 30710 (Banks & Bros. 1926) (explaining how Justice Blackburn's decision was affirmed by Lord Cairns on appeal in the House of Lords). *Fletcher* has been cited by many of the subsequent decisions on premises liability. See, e.g., *Wilson v. Newberry*, (1871) 7 L.R.Q.B. 31 at 33 (Eng.); *Dunn v. Birmingham Canal Navigation Co. Proprietors*, (1872) 7 L.R.Q.B. 244 at 258; *Nichols v. Marsland*, (1875) 10 L.R. Exch. 255 at 260; *Nat'l Tel. Co. v. Baker*, (1893) 2 Ch. 186 at 199 (Eng.); *Ponting v. Noakes*, [1894] 2 Q.B. 281 at 284 (Eng.); *Baker v. Snell*, [1908] 2 K.B. 825 at 831 (Eng.); *Read v. J. Lyons & Co.*, [1947] A.C. 156 (H.L.) 170 (Eng.); *Cambridge Water Co. Ltd. v. E. Counties Leather PLC*, [1994] 2 A.C. 264 (H.L.) 271 (Eng.).

27. 1 L.R. Exch. at 26769.

28. *Id.* at 279.

29. *Id.* *Fletcher* is considered the classic decision concerning "strict liability" decision where a defendant is held liable through no fault of his own. See OLIVER WENDELL HOLMES, *THE COMMON LAW* 79 (Am. Bar. Assn. ed. 2009) (1881) (writing that the liability in *Fletcher* flows from the public policy decision to make a person liable for inherently dangerous activities: such as maintaining a reservoir on one's property or keeping wild animals). After the *Fletcher* decision, Anglo-American common law jurisprudence moved sharply away from strict liability to a negligence regime to accommodate industrialized society. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860*, 97-99 (1977) (contending that the "negligence standard began to invade the general law governing [torts]" which inured to the benefit of "dynamic and growing forces in American society" as against "the weak and relatively powerless segments of the American economy"); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960*, 123-25 (1992) (discussing the transformation from strict liability to negligence principles in the context of contemporary jurisprudential thought).

The plaintiff prevailed because the defendant created and maintained a hazardous artificial condition on his land.³⁰

In 1878, not long after the *Fletcher* rule of premises liability was articulated, the Exchequer Division addressed the issue of *sic utere* and trees in the context of yew trees in a cemetery owned and operated by the defendants.³¹ Yew trees are quite poisonous to horses and other animals.³² In *Crowhurst v. Amersham Burial Bd.*, the defendants planted two yew trees on their land a few feet away from the border with the plaintiff's land.³³ The plaintiff's horse died after eating leaves from the branches of the yew tree that overhung the plaintiff's land.³⁴ Chief Baron Kelly, citing *Fletcher* and the maxim *sic utere*, found that the plaintiff had a valid cause of action for negligence against the defendant.³⁵ British courts in subsequent cases have followed this common-law position, although with less of an emphasis on whether the nuisance was naturally occurring or cultivated.³⁶ These subsequent cases frequently addressed issues

30. *Fletcher*, 1 L.R. Exch. at 280 (“[I]t seems but reasonable and just that the neighbour, who has brought something on his own property *which was not naturally there*, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property.”)(emphasis added).

31. *Crowhurst v. Amersham Burial Bd.*, (1878) 4 Exch. Div. 5 at 6 (Eng.).

32. *Pretty Poison: Plants to Die For*, CBSNEWS (Aug. 2, 2009, 11:07 AM), http://www.cbsnews.com/2100-3445_162-5204871.html (noting that the Japanese yew tree is quite toxic to horses, dogs, cattle, and humans but, interestingly, is also used in chemotherapy for cancer patients). The case of the yew tree (and other plants that have both toxic qualities and significant benefits, either aesthetic or otherwise) foreshadows an interesting aside to the case of reasonable land use and trees. That is, often a tree labeled by a lawsuit as a nuisance can be considered quite valuable. How courts weigh the relative benefits of an ornamental tree often goes to the crux of the maxim *sic utere*. For an explanation of how the Washington, D.C. Department of Transportation has addressed the problem of the ginkgo tree, which is aesthetically pleasing, but malodorous, see Mark Berman, *D.C. to Spray Ginkgo Trees*, WASH. POST (Apr. 5, 2012, 3:42 PM), http://www.washingtonpost.com/blogs/dr-gridlock/post/dc-to-spray-ginkgo-trees/2012/04/05/gIQAPOwxS_blog.html.

33. See *Crowhurst*, 4 Exch. Div. at 6.

34. *Id.*

35. *Id.* at 11 (describing a variety of similar property disputes and noting that in each case “the maxim ‘[s]ic utere tuo ut alienum non lædas’ was considered to apply; and those who so interfere with the enjoyment by their neighbours of their premises were held liable”). *Fletcher* and *Crowhurst* may seem incongruous because *Fletcher* concerned an *artificial* condition, whereas *Crowhurst* involved a tree. But the difference between the cases reflects a principle distinction in English common law regarding premises liability: the difference between “cultivated” and naturally-occurring trees. The Chief Baron in *Crowhurst* noted that the defendant planted, or at least allowed, the yew tree in question, to grow. *Id.* at 9. He further noted that the defendant urged the court to find that the plaintiff's right to self-help alleviated the need for judicial intervention. *Id.* at 910. *Crowhurst*, therefore, foreshadows a great many of the legal distinctions drawn by courts in determining what is reasonable land use with reference to trees.

36. See *Lemmon v. Webb*, [1894] 3 Ch. 1 at 12 (Eng.) (rejecting a comparison between a tree overhanging a neighbor's property and an artificial structure overhanging the property); *Davey v. Harrow Corp.*, [1958] 1 Q.B. 60 at 71, (holding that “once it is established that

of encroaching vegetation,³⁷ an issue that is often litigated in the United States as well.³⁸

C. Encroaching Vegetation Cases

Courts are often asked to determine whether a landowner's use of his property is reasonable with respect to encroaching vegetation.³⁹ Encroaching vegetation cases involve instances where a plant from the defendant's land invades the plaintiff's land and causes some sort of harm.⁴⁰ These disputes are often resolved through private nuisance suits.⁴¹ Courts in different jurisdictions have crafted several approaches to resolving these cases.⁴² The various approaches reflect the differing views courts have taken as to the extent self-help should be available to plaintiffs in encroaching vegetation situations and whether courts should intervene at all to resolve the encroaching suits.⁴³

1. The Massachusetts Rule: Self-Help Is the Only Remedy

The Massachusetts Rule is the oldest approach to encroaching vegetation cases. This rule refrains from imposing liability on the owners of the offending trees and only allows plaintiffs the remedy of self-help in these

encroachment by roots is a nuisance, it must follow that if damage is thereby caused, an action on the case will lie.”). The court then noted that it “[could not] find that any distinction has ever been drawn between [cultivated and naturally occurring] trees, except possibly in *Crowhurst v. Amersham Burial Board*, . . . nor do we see on what ground it could be.” *Id.*

37. See, e.g., *Davey*, 1 Q.B. at 60 (involving tree roots encroaching on the defendant's land); *Lemmon*, 3 Ch. at 1 (involving trees from plaintiff's land that overhung defendant's land).

38. See *infra* notes 3943 and accompanying text.

39. See, e.g., *Harndon v. Stultz*, 100 N.W. 329, 330 (Iowa 1904); *Schwalbach v. Forest Lawn Mem'l Park*, 687 S.W.2d 551, 552 (Ky. Ct. App. 1985); *Bliss v. Ball*, 99 Mass. 597, 598 (Mass. 1868).

40. *Lane v. W.J. Curry & Sons*, 92 S.W.3d 355, 364 (Tenn. 2002) (noting “encroaching trees and plants may be regarded as a nuisance when they cause actual harm or pose an imminent danger of actual harm to adjoining property. . . . [and] the owner of the tree or plant may be held responsible for harm caused by it”).

41. See, e.g., *Melnick v. C.S.X. Corp.*, 540 A.2d 1133 (Md. 1988) (addressing a private nuisance claim brought because of damage caused by trees, vines, and other plants encroaching from an adjoining property); *Lane*, 92 S.W.3d at 356, 364–65 (reviewing a private nuisance suit brought over encroaching tree branches and roots from a neighboring property); see also *Fancher v. Fagella*, 274 Va. 549, 552 (Va. 2007) (discussing a private nuisance suit brought because of damage caused by a neighbor's sweet gum tree).

42. See *Lane*, 92 S.W.3d at 36063 (evaluating the various approaches that courts have tried and adopting the Hawaii Rule as the approach for Tennessee courts to follow).

43. Compare *Michalson v. Nutting*, 175 N.E. 490, 49091 (Mass. 1931) (limiting a landowner's remedy in an encroaching vegetation case to self-help) with *Smith v. Holt*, 5 S.E.2d 492, 493–94 (Va. 1939) (allowing for judicial remedies in addition to self-help *only* when the vegetation at issue is “noxious”) overruled by *Fancher*, 650 S.E.2d at 522, and *Whitesell v. Houlton*, 632 P.2d 1077, 1079 (Haw. Ct. App. 1981) (providing landowners with remedies other than self-help when the encroaching plant poses an imminent harm to property).

cases.⁴⁴ The Massachusetts Rule was first set forth in the 1868 case, *Bliss v. Ball*.⁴⁵ The dispute in *Bliss* arose after the defendant entered onto the plaintiff's neighboring land and girdled four of the plaintiff's maple trees that the defendant claimed "made his house damp and unhealthy."⁴⁶ The plaintiff sued the defendant for trespass *quare clausum fregit*.⁴⁷ The Supreme Court of Massachusetts found for the plaintiff and upheld a \$400 jury award against the defendant.⁴⁸ The *Bliss* court held that the harm caused by the trees was *damnum absque injuria*, i.e., an injury for which the defendant had no legal remedy, and thus the defendant was not privileged to enter his neighbor's land and destroy the plaintiff's shade trees.⁴⁹

44. Self-help is generally defined as "[a]n attempt to redress a perceived wrong by one's own action rather than through the normal legal process." BLACK'S LAW DICTIONARY 1482 (9th ed. 2009). In the context of encroaching trees, self-help usually involves a plaintiff trimming back portions of an offending tree or erecting some sort of barrier on the adjoining border between the plaintiff's and defendant's land. See *Scott v. McCarty*, 41 So. 3d 989, 989 (Fla. Dist. Ct. App. 2010) (citing to the common-law rule that, although a cause of action in equity does not lie for nuisance caused by a defendant's overhanging branches, the plaintiff may resort to self-help to remove offending branches); *Harndon*, 100 N.W. at 330 (finding that a plaintiff's only remedy was to resort to self-help by cutting down or digging up only the encroaching portions of the offending trees); *Lane*, 92 S.W.3d at 360 (noting that landowners are permitted to resort to self-help, "meaning that the landowner has the right to cut encroaching branches, roots, and other growth to the property line, but may not enter the adjoining property to chop down the tree or plant or cut back growth without the adjoining property owner's consent."); see also DAN B. DOBBS, LAW OF REMEDIES § 1.1, at 9 (2d ed. 1993) (noting that "[s]elf-help remedies are sometimes actually recognized by law. . . . [such as] remov[ing] a trespassing object from the land or even [abating] a nuisance.") (emphasis added).

45. 99 Mass. 597, 598 (Mass. 1868) (holding that the defendant-landowners were not liable for alleged injury caused by the shade of trees planted upon their land where the plaintiffs did not allege encroachment of the actual branches).

46. *Id.* at 597–98. Girdling was a popular nineteenth century method for killing trees and clearing large tracts of land. See Adam Taylor & Paul Cooper, *The Effect of Stem Girdling on Wood Quality*, 34 WOOD AND FIBER SCI. 212, 213 (2002) (explaining that "[p]hloem-girdling is a method of killing a tree in which a strip of bark is removed from around the circumference of the trunk [such that] [t]he tree continues to live for a while, but the movement of photosynthates to the roots is interrupted and eventually the tree dies") (citation omitted); Thomas Lovejoy, *Sylvan Tragedy*, 91 AM. SCIENTIST 455, 456 (2003) (book review) available at <http://www.americanscientist.org/bookshelf/pub/sylvan-tragedy> (quoting the British author Basil Hall, who in the 1820s described "numerous ugly stumps of old trees; others allowed to lie in the grass guarded, as it were, by a set of gigantic black monsters, the *girdled*, scorched and withered remains of the ancient woods") (emphasis added).

47. *Bliss*, 99 Mass. at 597. A trespass *quare clausum fregit* is defined as "[a] person's unlawful entry on another's land that is visibly enclosed." BLACK'S LAW DICTIONARY 1643 (9th ed. 2009). This tort is also known as "trespass to real property" or "trespass to land." *Id.*

48. *Bliss*, 99 Mass. at 598.

49. *Id.* "*Damnum absque injuria*" means "[l]oss or harm that is incurred from something other than a wrongful act and occasions no legal remedy." BLACK'S LAW DICTIONARY 450 (9th ed. 2009) (quoting R.F.V. HEUSTON, SALMOND ON THE LAW OF TORTS 13 (17th ed. 1977)) ("There are many forms of harm of which the law takes no account. Damage so done and suffered is called *damnum absque injuria*, and the reasons for its permission by the law are various . . . For example, the harm done may be caused by some person who is merely exercising

In the 1931 case *Michalson v. Nutting*, the Supreme Judicial Court of Massachusetts first applied the Massachusetts Rule established in *Bliss* to a case involving encroaching vegetation.⁵⁰ In *Michalson*, the roots of the defendant's poplar tree grew under the plaintiff's land, clogging his sewer pipes, damaging his cellar, and undermining the foundation of his house.⁵¹ The court affirmed the trial court's holding for the defendant, finding no legal error.⁵² In essence, the Massachusetts Rule states that an aggrieved party may not seek judicial redress for harm caused by his neighbor's trees, but rather may undertake self-help.⁵³ Although the Massachusetts Rule is not the only solution available in encroaching vegetation cases, following *Michalson*, the rule was applied and adopted by many courts in a variety of circumstances.⁵⁴

his own rights . . . or where the damage is done by a man acting under necessity to prevent a greater evil."); see also Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence From Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 1027 (citing EDWARD P. WEEKS, *THE DOCTRINE OF DAMNUM ABSQUE INJURIA* CONSIDERED IN ITS RELATION TO THE LAW OF TORTS § 47, at 60 (1879) (noting that some jurisdictions grant no legal protection to the interest of unobstructed light and air); Oliver Wendell Holmes, Jr., *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1, 3–4 (1894) (using aesthetic harm as an example of *damnum absque injuria*).

50. 175 N.E. 490, 490 (Mass. 1931) (extending the *Bliss* court's holding to include invading roots and overhanging branches that cause damage as another injury for which there was no remedy in the courts).

51. *Id.*

52. *Id.* (explaining that there was no difference between damage done by encroaching roots or branches because it is expected that trees will naturally grow across property lines).

53. *Id.* at 490–91 (noting that "[t]he neighbor . . . is . . . not without remedy" which lies "in his own hands" to "cut off the intruding boughs and roots"). For a discussion of the full extent of remedies available in the context of harms to a plaintiff's interest in real property, see DOBBS, *supra* note 44, §5, at 492–544. Dobbs describes the way a plaintiff's interest in the use and enjoyment of real property may be violated by a defendant's unreasonable conduct. *Id.* at §5, at 513–14. Dobbs notes that the appropriate measure of damages includes market damages, such as diminished rental value and costs of repair or abatement, and damages not based on value of the property, including "personal discomfort, illness or mental anguish resulting from the nuisance." *Id.* §5.6(2), at 515. Dobbs also describes the available types of injunctive relief. *Id.* § 5.7(2)–(4), at 518–28. Anticipatory nuisance is another property law doctrine that is important to consider in the context of encroaching vegetation that harm persons and property. See George P. Smith, II, *Re-validating the Doctrine of Anticipatory Nuisance*, 29 VT. L. REV. 687, 696–97 (2005) [hereinafter Smith, *Re-validating the Doctrine*] (noting that, despite being rarely used, anticipatory nuisance is "a useful and resource-saving doctrine" because the "action . . . is brought *before* the unreasonable use has occurred."). According to Smith, "the doctrine gives courts '[t]he power to interfere by injunction to restrain a party from so using his own property as to destroy or materially prejudice the rights of his neighbor.'" *Id.* (quoting *Adams v. Michael*, 38 Md. 123, 125 (1873)) (citations omitted). Smith explains that while most state courts have inconsistently applied the anticipatory nuisance doctrine, two states—Georgia and Alabama—have statutorily authorized courts to issue injunctions *before* a nuisance actually causes harm. *Id.* at 703–06 (referencing Ga. Code Ann. § 41-2-4 (1991) and Ala. Code 6-5-125 (1975)). Finally, Smith argues that more courts should apply the doctrine of anticipatory nuisance as it leads to the most reasonable and economically desirable outcome. *Id.* at 731–32.

54. See, e.g., *Sterling v. Weinstein*, 75 A.2d 144, 148 (D.C. 1950) (citing the "simplicity and certainty" of the Massachusetts Rule when choosing to adopt it in an encroaching vegetation

2. *The Restatement Rule: Restating the English Common Law*

Another strand of cases has developed an alternative rule, which imposed liability on adjacent landowners pursuant to the Restatement (Second) of Torts.⁵⁵ The Restatement adopts the English common law rule that a landowner is only liable for the *artificial* conditions on his or her land; accordingly, the Restatement recognizes that landowners in urban areas have a greater duty of reasonable care than those in rural areas.⁵⁶ The courts following the Restatement Rule look to sections 839 and 840 when determining liability and impose liability only for encroaching vegetation that is "artificial."⁵⁷

In 1982, the Court of Appeals of Michigan adopted the Restatement approach in *Ken Cowden Chevrolet, Inc. v. Corts*, a case in which the plaintiff automobile dealer sued a neighboring landowner for maintaining a tree on the property line between the two parcels of land that obstructed the plaintiff's sign.⁵⁸ The Court applied the Restatement Rule, considered whether the conditions complained of were natural or artificial, and upheld the defendant's motion for summary judgment.⁵⁹ Although the Restatement Rule has

case); *Richmond v. Gen. Eng'g Enter. Co.*, 454 So.2d 16, 17 (Fla. Dis. Ct. App. 1984) (mentioning *Michaelson* when adopting the rule of self-help as the only redress for a plaintiff when the defendant's tree limbs encroached upon the plaintiff's property); *Schwalbach v. Forest Lawn Mem'l Park*, 687 S.W.2d 551, 551-53 (Ky. Ct. App. 1985) (declining to impose liability when the overhanging limbs of the defendant's trees caused leaves, twigs, and seeds to fall upon and damage the plaintiff's roof by adopting the Massachusetts Rule as set forth in *Michaelson*); *Melnick v. C.S.X. Corp.*, 540 A.2d 1133, 1135-38 (Md. 1988) (discussing various liability regimes vis-à-vis encroaching vegetation and adopting the Massachusetts Rule.) The *Melnick* court further noted that, "[w]e have gotten along very well in Maryland, for over 350 years, without authorizing legal actions of this type by neighbor against neighbor." *Id.* at 1138.

55. See, e.g., *infra* notes 58 and 60.

56. See RESTATEMENT (SECOND) OF TORTS § 363(2) (1965) ("A possessor of land in an urban area is subject to liability to persons using a public highway for physical harm resulting from his failure to exercise reasonable care to prevent an unreasonable risk of harm arising from the condition of trees on the land near the highway."). But see *id.* § 363 cmt. 2 (noting that the Restatement's rule related to public highways is an exception that requires only reasonable care to prevent harm caused by trees).

57. See *id.* § 839 (defining nuisance liability for an "abatable artificial condition" as when "(a) the possessor knows or should know of the condition and the nuisance or unreasonable risk of nuisance involved, and (b) he knows or should know that it exists without the consent of those affected by it, and (c) he has failed after a reasonable opportunity to take reasonable steps to abate the condition or to protect the affected persons against it."); see also *id.* § 840 (setting forth exceptions to the nuisance liability for an "abatable artificial condition" as when the nuisance arises from the natural condition of the land but maintaining liability if a landowner knows of a public nuisance caused by a natural condition on neighboring public land).

58. *Ken Cowden Chevrolet, Inc. v. Corts*, 316 N.W. 259, 260-61 (Mich. Ct. App. 1982) (applying the Restatement Rule in determining whether defendant's tree constituted a nuisance).

59. *Id.* The court upheld the grant of summary judgment for the defendant because the plaintiff filed a *public*, and not a *private*, nuisance claim and failed to allege a requisite statutory violation by the defendant. *Id.*

important common-law principles at its heart, it is not followed as frequently as the other rules discussed herein.⁶⁰

3. *The Virginia Rule: Is It “Noxious” in the Eye of the Beholder?*

Another framework for assigning liability for unreasonable land use with respect to encroaching vegetation is the Virginia Rule, elucidated in *Smith v. Holt*.⁶¹ The *Smith* case concerned a privet hedge that abutted the plaintiff’s neighboring land and interfered with the plaintiff’s flowerbed.⁶² The Virginia Supreme Court sided with the defendant and enunciated the rule that a plaintiff is limited to self-help *unless* the offending plant is “noxious” *and* caused damage to the plaintiff’s land.⁶³

4. *The Hawaii Rule: A Modern Approach to Encroaching Vegetation*

The Hawaii Rule, as established by the Hawaii Intermediate Court of Appeals decision in *Whitesell v. Houlton*, is the most common liability template adopted by courts.⁶⁴ *Whitesell* examined a negligence suit brought by a landowner when his neighbor’s encroaching banyan trees damaged his Volkswagen van and the roof of his garage.⁶⁵ The *Whitesell* court adopted a modified version of the Virginia Rule and held that “overhanging branches or protruding roots constitute a nuisance only when they *actually cause, or there is imminent danger of them causing, sensible harm to property*. . . .”⁶⁶ The court further noted that if the encroaching vegetation does not cause actual

60. See *Lane v. W.J. Curry & Sons*, 92 S.E.3d 355, 36162 (Tenn. 2002) (noting that only a few jurisdictions still follow the Restatement Rule, but that most have rejected it as unworkable); see also *Griefield v. Gibraltar Fire & Marine Ins. Co.*, 24 So.2d 356, 357 (Miss. 1946) (“The test of the appellant’s liability *vel non* is whether the tree from which this limb overhung the land of the appellee’s assignors was of natural growth or had been planted by the appellant or a former possessor of her land” with liability only attaching to the latter scenario.) (citations omitted).

61. *Smith v. Holt*, 5 S.E.2d 492, 495 (Va. 1939), *overruled by* *Fancher v. Fagella*, 650 S.E.2d 519, 522 (Va. 2007).

62. *Id.* at 492–93.

63. *Id.* at 495. The *Smith* court declared that “when it appears that a sensible injury has been inflicted by the protrusion of roots from a noxious tree or plant onto the land of another,” the affected plaintiff has a cause of action. *Id.* But when the plant is not noxious and the plaintiff has not reasonably been injured, the plaintiff cannot state a claim. *Id.* Other jurisdictions have also adopted the Virginia Rule. See *Cannon v. Dunn*, 700 P.2d 502, 504 (Ariz. Ct. App. 1985) (adopting a slightly modified version of the Virginia Rule).

64. *Whitesell v. Houlton*, 632 P.2d 1077, 1079 (Haw. Ct. App. 1981).

65. *Id.* at 1078.

66. *Id.* at 1079 (holding that the defendant was liable for the damage caused by his tree because he maintained plants and trees on his land that posed an imminent danger of causing actual harm to neighboring property).

harm, or the threat of harm, an afflicted plaintiff may resort to self-help.⁶⁷ Many jurisdictions follow this rule.⁶⁸

D. Trees and Personal Injury Suits Across Jurisdictions

An analysis of liability incurred by property owners relative to public highways abutting their property is also relevant in analyzing *Cline* and the issues that case presents.⁶⁹ Similar to the jurisprudence on encroaching vegetation, multiple approaches have also developed to allocate liability when trees fall across public highways. Cases of this character typically address the tree's locality.⁷⁰ These cases draw a distinction between rural and urban areas—holding that a duty of reasonable care to maintain trees located along public roadways typically applies in urban areas but not in rural areas.⁷¹ Integral to this idea is the issue of whether a landowner has a duty to inspect potentially hazardous trees.⁷²

67. *Id.* The court also specifically limited its holding by stating that “casting shade or dropping leaves, flowers, or fruit” does not constitute sensible harm. *Id.*

68. *See, e.g.,* Abbinett v. Fox, 703 P.2d 177, 181 (N.M. Ct. App. 1985) (adopting the Hawaii Rule because the “approach voices a rational and fair solution” that balances the landowner’s choice to cultivate vegetation on his land with his duty to prevent his property use from materially harming his neighbor); Lane v. W.J. Curry & Sons, 92 S.W.3d 355, 363 (Tenn. 2002) (deciding to follow the Hawaii Rule); Fancher v. Fagella, 650 S.E.2d 519, 522 (Va. 2007) (rejecting the Virginia Rule and adopting the Hawaii Rule).

69. The topic of whether a state Department of Transportation or private landowner bears the onus of maintaining the trees that border public highways is often referenced by courts; however the Virginia Supreme Court deliberately avoided the issue in *Cline*. *Cline*, 726 S.E.2d 14, 18 n.6 (Va. 2012) (declining to address the duty of the Virginia Department of Transportation (VDOT) or other state office and agencies to maintain highway safety); *Id.* at 21 n.6 (same). There will be no discussion in this Comment regarding what duty VDOT has as to maintaining the trees along highways because both the *Cline* majority and dissent explicitly framed the issue so as to avoid discussing this duty.

70. *See* Chambers v. Whelan, 44 F.2d 340, 341 (4th Cir. 1930) (“In the early days of the Republic, the mere suggestion that it was the duty of a landowner to inspect trees on rural lands would have excited ridicule.”); Mahurin v. Lockhart, 390 N.E.2d 523, 525 (Ill. App. Ct. 1979) (explaining that when determining liability it is appropriate to consider the tree’s locality, the level of potential danger and the difficulty of preventing that danger); Barker v. Brown, 340 A.2d 566, 569 (Pa. Super. Ct. 1975) (stating that “the relatively minor expenditures in time and money that it will take to inspect and secure trees in a developed or residential area is not large when compared with the increased danger and potential for damages represented by the fall of such a tree.”).

71. *Compare* Mahurin, 390 N.E.2d at 524–25 (analyzing the issue of liability in the context of an urban area and determining that the defendant had a duty to exercise reasonable care), *with* Chambers, 44 F.2d at 341 (holding that the defendant-rural landowner was not charged with a duty to inspect his trees that border a public road).

72. *See* Barker, 340 A.2d at 569 (stating that “[i]f the possessor of land in or adjacent to a developed area knows, or should know, through inspection or otherwise, that a defect in one of his trees poses an unreasonable danger to others outside of the land, he is under a duty to eliminate the danger”).

Professor Prosser summarized the duties that depend heavily on the dead tree's locality aptly:

[t]he owner of rural land is not required to inspect it to make sure that every tree is safe, and will not fall over into the public highway and kill a person, although there is already some little dissent even as to this and, at least if the defendant knows that the tree is dangerous, he may be required to take affirmative steps. But when the tree is in an urban area, and may fall into a city street, the landowner now has a duty of reasonable care, including inspection to make sure that the tree is safe. . . . The tree cases may suggest that the ordinary rules as to negligence should apply generally to natural conditions, at least in urban and residential areas, so that the inquiry would focus upon such factors as the nature of the locality, the seriousness of the danger, and the ease with which it may be prevented, in light of all the circumstances.⁷³

This distinction between rural and urban landowners was analyzed in *Hensley v. Montgomery County*, a case that added a nuance to Prof. Prosser's comments regarding the locality of a tree that injures someone. *Hensley* is factually similar to *Cline*.⁷⁴ In *Hensley*, the plaintiff was injured when a tree fell on his car as he drove along a public roadway in Maryland.⁷⁵ He sued the municipality and landowner on whose land the tree grew by alleging the landowner had duty to clear dead or decaying trees.⁷⁶ The *Hensley* court examined the issue under the urban/rural paradigm and described land that falls between the urban and rural classifications as "Suburban Forest," a "grey area . . . [resulting when a] population increase causes city and suburban growth to continually encroach upon rural areas."⁷⁷ The court ultimately ruled in favor of the landowner.⁷⁸

In *Brandywine Hundred Realty Co. v. Cotillo*, the Third Circuit Court of Appeals succinctly stated the landowner's duty to travelers on highways concerning dead or decaying trees.⁷⁹ In *Brandywine*, a tree on the defendant's

73. W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 57 at 391 (5th ed. 1984). Rural landowners are not held liable for natural conditions because the burden of inspecting and improving land conditions is usually greater than any harm potentially caused by such conditions. *Id.* However, this rationale does not apply equally to urban areas. *Id.*

74. 334 A.2d 542, 543 (Md. Ct. Spec. App. 1975).

75. *Id.*

76. *Id.*

77. *Id.* at 546.

78. *Id.* at 547. In declining to impose liability against the landowner, the court appears to have acted less based on the common law principles of premises liability and more out of a concern of avoiding "legislating" from the bench. *Id.* at 369–70 ("Were we to extend the urban inspection responsibility to suburban forests, we would be in effect "legislating" a policy concept."). Additionally, the *Hensley* court spoke extensively about constructive notice, and only briefly referred to the landowner's duty of care owed to drivers on adjacent highways. *Id.*

79. *Brandywine Hundred Realty Co. v. Cotillo*, 55 F.2d 231, 231 (3d Cir. 1931).

land fell onto the plaintiff's car as he drove down a suburban road in Delaware, injuring the plaintiff and killing his passenger.⁸⁰ The *Brandywine* court upheld a judgment against the defendant landowner solely on the application of the *sic utere* maxim:

After all is said and done, this case turns on the application of the time honored principle of law, "sic utere tuo ut alienum non laedas"—so use your own as not to injure another. Of the right of the plaintiff to drive along the public road there can be no question. And of the duty of an abutting landowner to so use his property on his own land that it shall not cumber the highway and endanger the safety of those using it there would seem to be no doubt.⁸¹

There are four major methods by which to determine how to allocate liability in those cases where a falling tree causes injury to persons or property. The first turns on whether the tree's locality is urban or rural.⁸² The second requires an inquiry into the general character of the highway in question and the land that abuts it.⁸³ A third approach, used in *Brandywine*, imposes liability generally, irrespective of the tree's locality.⁸⁴ Lastly, some courts assess liability using ordinary negligence principles.⁸⁵ The Virginia Supreme

80. *Id.*

81. *Id.* *Contra* O'Brien v. United States, 275 F.2d 696, 698 (9th Cir. 1960) (distinguishing rural "falling tree cases" from those involving urban or suburban properties, consequently declining to impose a duty of reasonable care on rural landowners).

82. *See, e.g.,* Chambers v. Whelan, 44 F.2d 340, 341 (4th Cir. 1930) (holding that the question of liability turned on the threat of danger to others, understandably lesser in rural areas); Zacharias v. Nesbitt, 185 N.W. 295, 295 (Minn. 1921) (concluding that the landowner had no affirmative duty to maintain trees adjacent to a rural highway); Ford v. S.C. Dep't of Transp., 492 S.E.2d 811, 814 (S.C. Ct. App. 1997) (quoting Cantrell v. Green, 397 S.E.2d 777, 779 (S.C. Ct. App. 1990)) (reaffirming the "rule of nonliability for natural conditions" and finding that the duty to prevent unreasonable risk of harm does not extend to owners of rural land); *accord* James T.R. Jones, *Trains, Trucks, Trees and Shrubs: Vision-Blocking Natural Vegetation and a Landowner's Duty to Those Off the Premises*, 39 VILL. L. REV. 1263, 1271-76 (1994) (reaffirming that, in many jurisdictions, landowners are not responsible for injuries caused by natural conditions; rather, it is the injured party's responsibility to avoid the hazardous condition).

83. *See, e.g.,* Miles v. Christensen, 724 N.E.2d 643, 646-47 (Ind. Ct. App. 2000) (imposing liability where the land was adjacent to a traveled highway and located one mile east of a city, where the court determined "regular public visitation would [not] be unexpected"); Taylor v. Olsen, 578 P.2d 779, 782-83 (Or. 1978) (holding the defendant liable because the land in question abutted a paved highway that was travelled by approximately 790 cars per day).

84. *See Brandywine*, 55 F.2d at 231 (holding the defendant responsible because of the landowner's duty, based on the *sic utere* axiom, to exercise ordinary care to prevent injuries to his neighbors); *see also* Medeiros v. Honomu Sugar Co., 21 Haw. 155, 159 (Haw. 1912) (equating the duties of urban building owners with those of rural landowners and finding the defendant liable because it breached its duty to inspect the tree in order to prevent injury); *accord* Dix W. Noel, *Nuisances From Land in Its Natural Conditions*, 56 HARV. L. REV. 772, 790 (1943) (explaining that several jurisdictions impose a duty to inspect on the landowner, regardless of whether the land is rural or urban).

85. Gibson v. Hunsberger, 428 S.E.2d 489, 492 (N.C. Ct. App. 1993) (holding that the defendant must have actual or constructive notice of the dangerous condition—the defective

Court considered each of these analytical frameworks when determining whether the landowner was liable in *Cline v. Dunlora South LLC*.⁸⁶

E. Cline v. Dunlora South, LLC: A Study in Sic Utere and the Hawaii Rule

The underlying facts of *Cline* are simple and direct. Matthew Cline was injured while driving along Rio Road East in Albemarle County, Virginia, outside of Charlottesville.⁸⁷ As Cline approached the intersection of Rio Road and Pen Park Drive, a tree fell on his car, causing severe damage to the vehicle and substantial personal injuries to Cline.⁸⁸ Dunlora South, LLC owned the land abutting the public highway that the tree was located on.⁸⁹

The tree in question, roughly twenty-five inches in diameter at the time of the accident, was “dying, dead, and/or rotten.”⁹⁰ The tree “had been in this condition for a period of ‘many years and exhibited visible signs of decay, which were open, visible and/or obvious.’”⁹¹ Cline contended that Dunlora knew or should have known about both the condition of the tree and the hazards posed by the tree’s proximity to the public roadway.⁹²

In February of 2010, Cline filed suit in the Circuit Court of Albemarle County against Dunlora for the injuries resulting from the accident.⁹³ After the trial court sustained Dunlora’s demurrer, Cline amended his complaint to allege both negligence and private nuisance.⁹⁴ After Cline amended his complaint, Dunlora again moved to dismiss the claim. But the trial court heard arguments on a single legal question before ruling on the demurrer: “whether or not a landowner in Virginia is liable for personal injuries, as opposed to property damage, caused by a tree which was an imminent danger or caused actual harm to adjoining property or persons on that property.”⁹⁵ The trial court again sustained Dunlora’s demurrer, and Cline appealed to the Virginia

tree—in order to be liable for injuries sustained by the plaintiff); *see also* Pulgarin v. Demonteverde, 63 A.D.3d 1026, 1026–27 (N.Y. App. Div. 2009) (imposing liability only where a property owner *knew or should have known* of the dangerous condition presented by the tree).

86. *Cline v. Dunlora S., LLC*, 726 S.E.2d 14, 16–18 (Va. 2012) (discussing each approach); *see also infra* Part I.E (detailing the procedural history of, and analysis in, *Cline*).

87. *Cline*, 726 S.E.2d at 15.

88. *Id.*

89. *Id.* The tree was located approximately 15.6 feet from Rio Road East, a public highway traveled by more than 25,000 vehicles per day. *Id.*

90. *Id.* at 15–16.

91. *Id.*

92. *Id.*

93. *Id.* at 15.

94. *Id.* Cline specifically alleged that the defendant’s “lack of care, inspection, servicing, and/or maintenance of the subject property and tree was a condition that imperiled the safety of the public highway immediately adjacent to the property and tree, creating a danger and hazard to motorists and/or pedestrians.”

95. *Cline v. Dunlora S., LLC*, 81 Va. Cir. 235, 235–36 (Va. Cir. Ct. 2010) (ruling in favor of the defendant and sustaining Dunlora’s motion to dismiss).

Supreme Court, which affirmed the circuit court's decision and entered final judgment in favor of Dunlora.⁹⁶

II. UNWORKABLE DISTINCTIONS: ANALYZING VARIOUS LIABILITY REGIMES PROPOSED BY COURTS

Courts must address several considerations when determining which of the diverse rules to apply when assigning liability in cases where trees cause harm to persons or property. First, how difficult is it for a court to apply the distinctions in the law? Second, is it more efficient to leave these decisions outside of the purview of the judiciary? This is often discussed when a court wrestles with the extent to which self-help should be a plaintiff's sole, or predominant, remedy. Third, what is the role of the common law in determining precedent? The common law has developed to provide consistency and substance to legal rules applied across jurisdictions for a variety of facts.⁹⁷

A. Unworkable Dichotomies in Encroaching Vegetation Regimes

The four proposed rules for assigning liability in encroaching vegetation cases—the Massachusetts Rule, the Restatement Rule, the Virginia Rule, and the Hawaii Rule—reflect the difficulties courts face in determining whether a defendant used his land unreasonably when trees planted thereon caused injury to a plaintiff.⁹⁸

Although the Massachusetts Rule is the most restrictive rule in terms of plaintiff's rights, the rule has a certain logic underpinning it. The Massachusetts Rule balances the relative duties and responsibilities of all parties involved, and allocates liability by restricting the remedies available to the plaintiff to self-help.⁹⁹ The Massachusetts Supreme Judicial Court noted in *Michalson v. Nutting* that no legally recognized injury is done to adjoining land proprietors when their neighboring landowners' trees merely cast shade upon the property.¹⁰⁰ Exploring the logic behind this rule, the court noted that “if

96. *Cline*, 726 S.E.2d at 15, 18 (holding, with three judges dissenting, that Virginia does not impose a duty on landowners to protect travelers on an adjacent thoroughfare from conditions that naturally occur on the land).

97. See HOLMES, *supra* note 29, at 1 (explaining that “[t]he life of the law has not been logic: it has been experience,” which is informed by “the felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellowmen”); see also Henry N. Butler, *A Defense of Common Law Environmentalism: The Discovery of Better Environmental Policy*, 58 CASE W. RES. L. REV. 705, 70708 (2008) (discussing the flexibility of the common law to accommodate shifting societal preferences).

98. See *supra* Part I.C.

99. See *supra* notes 44 and 53 and accompanying text (defining the concept of self-help in the Massachusetts Rule and explaining the bar on suits).

100. 175 N.E. 490, 490 (Mass. 1931) (quoting *Bliss v. Ball*, 99 Mass. 597, 598 (Mass. 1868)).

harm results to [a plaintiff] from this exercise of another's right to use his property in a reasonable way, [it is wiser to turn to self-help] than to subject [a defendant] to the annoyance, and the public to the burden, of actions at law."¹⁰¹

Those courts following the Massachusetts Rule balance the interests of the parties and keep the courts out of contentious disputes between adjoining landowners.¹⁰² Because these cases often hinge on the reasonability of land use and the minimization of waste, the Massachusetts Rule allows neighbors to remove encroaching limbs, branches and roots from their property without clogging the legal system with potentially bitter and petty disputes.¹⁰³ The Massachusetts Rule avoids waste by mandating a non-judicial remedy, thus promoting judicial economy and eliminating economic waste in terms of litigation costs.¹⁰⁴

This rule of liability is subject to quite a few criticisms. First, it often leaves plaintiffs who have been harmed by their neighbor's unreasonable land use, with no adequate remedy.¹⁰⁵ Self-help is an inappropriate remedy when, for example, a tree has already fallen through a garage or clogged up a sewage system, because in that instance, the most costly harm has already been absorbed by the plaintiff. The remedy of self-help does *nothing* to compensate them for the cost of repairing their homes.¹⁰⁶ Furthermore, although the logic of the Massachusetts Rule hinges on judicial economy, at least one court has suggested that crafting a rule that relies on plaintiffs obtaining *post facto* judicial approval for taking unilateral action may create *more* litigation than it prevents.¹⁰⁷ Finally, the Massachusetts Rule appears to be an archaic vestige

101. *Id.* at 491.

102. *See supra* Part I.C.1 (explaining the Massachusetts Rule's philosophy and preferred remedy).

103. *See supra* note 44, 53 and accompanying text (describing how the concept of self-help in the Massachusetts Rule pertains to real property in the context of encroaching vegetation); *see also* Smith, *Nuisance Law*, *supra* note 15, at 696 n.262 (describing the law of waste). Smith states that "[w]aste is defined generally as a tort, the focus of which is alteration, destruction, misuse or neglect of real property or a part of a tenement by an individual in lawful possession, as a tenant for life or for years, to the detriment of the estate or interest therein of another." *Id.* Smith further explains that determining when an act is waste is fact-specific and depends on factors like the "customs of the neighborhood, character of the premises and the extent to which the reasonableness of the contested acts is regarded as useful." *Id.*; *see also* Robert J. Rhee, *A Price Theory of Legal Bargaining: An Inquiry Into the Selection of Settlement and Litigation Under Uncertainty*, 56 EMORY L. J. 619, 622 n.7 (2006) (highlighting the issue of waste in civil litigation and noting the high costs placed on the system therefrom).

104. *Cf. Rhee, supra* note 103, at 622 (explaining how people tend litigate civil suits unnecessarily when litigation is a potential remedy).

105. *See Whitesell v. Houlton*, 632 P.2d 1077, 1079 (Haw. Ct. App. 1981) (arguing that the Massachusetts Rule may be "simple and certain" but questioning how equitable it is).

106. *See supra* note 44 and accompanying text (explaining the parameters of self-help and what can be accomplished through it).

107. *See Ludwig v. Creswald, Inc.*, 7 Pa. D. & C.2d 461, 463 (1956) (explaining that petty neighborhood quarrels would be greatly increased under a rule that limits the remedy to self-help).

of a time where land was generally less developed.¹⁰⁸ In view of the apparent shortcomings of this rule and the elimination of the historical need, it seems imprudent for it to retain any modern significance.¹⁰⁹

Similar arguments can be made as to the logic underlying the Restatement Rule, which requires courts to distinguish between “natural” and “artificial” hazards.¹¹⁰ This rule punishes landowners only in those instances when they altered the natural landscape to make it more dangerous.¹¹¹ The majority of criticism leveled at this rule hinges on the difficulty in determining whether a given plant is of natural or artificial origin.¹¹² It typically cannot be readily determined whether the tree took root and grew naturally or whether it was planted intentionally, and if so, by whom.¹¹³ Further, the Restatement Rule’s distinction between natural and artificial conditions seems to arbitrarily punish some landowners.¹¹⁴

Just as courts wrestled with the uncertainty in determining whether a plant was of natural or artificial origins, courts similarly struggled with determining whether a given tree was “noxious” under the Virginia Rule.¹¹⁵ In articulating the Virginia Rule, the Virginia Supreme Court stated that a landowner has a cause of action for an injury caused by the roots of noxious vegetation

108. The Illinois Court of Appeals has indicated that the Massachusetts Rule places history over logic. *Mahurin v. Lockhart*, 390 N.E.2d 523, 524 (Ill. App. Ct. 1979) (stating that “[t]he traditional rule of nonliability developed at a time when land was mostly unsettled and uncultivated [and] [t]he landowner, unable to keep a daily account of and remedy all of the dangerous conditions arising out of purely natural causes, was therefore shielded from liability out of necessity.”).

109. See Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1987) (“It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.”).

110. See *supra* Part I.C.2.

111. See *Ken Cowden Chevrolet, Inc. v. Corts*, 316 N.W.2d 259, 261 (Mich. Ct. App. 1982) (quoting *Merriam v. McConnell*, 175 N.E.2d 293, 296 (Ill. App. Ct. 1961) (stating that, under the Restatement Rule, a legal nuisance cannot be created without the contributions of a man’s actions)).

112. *Sterling v. Weinstein*, 75 A.2d 144, 147 (D.C. Cir. 1950) (explaining the inherent problems with the Restatement Rule’s natural versus artificial distinction, including whether the tree grew naturally or was either planted or cultivated by the landowner).

113. See *id.* (noting that “it would be difficult and perhaps impossible to determine if the trees are of natural growth”); *Lane v. W.J. Curry & Sons*, 92 S.W.3d 355, 36162 (Tenn. 2002) (citing *Harvey v. Hanson*, 45 A.2d 1228, 1231 (Pa. Super. Ct. 1982) (stating that the Restatement Rule has been largely discarded because of the difficulty regarding the distinction between natural and artificial conditions)).

114. *Harvey*, 445 A.2d at 1231 (indicating this standard for imposing liability “appears to be arbitrary at best.”); see also *Sterling*, 75 A.2d at 147 (rejecting the Restatement Rule as impractical).

115. See *Fancher v. Fagella*, 650 S.E.2d 519, 522 (Va. 2007) (noting that the subjective nature of the term “noxious” makes it difficult to apply the Virginia Rule).

encroaching on his land.¹¹⁶ Although there is cogency to the argument that a landowner should be held liable only when his tree poses an inherent danger to another's property, this rule has largely been discarded and deemed more unworkable than the Restatement Rule.¹¹⁷ As the court in *Melnick v. C.S.X Corp.* complained, "the Restatement and the Virginia rules depend upon distinctions which are vague, difficult to apply, and largely arbitrary."¹¹⁸ Whether a plant is noxious depends on the eye of the beholder.¹¹⁹

The appeal of the Hawaii Rule, then, is in its ability to shed unworkable dichotomies and instead impose liability based on the prospect of harm which will result from a landowner's inactivity or unreasonable carelessness.¹²⁰ Although the Hawaii Rule could be criticized for opening the legal system to too many trivial suits, the court in *Lane* correctly argued "imposing a requirement of actual harm or imminent danger of actual harm to the adjoining property is a sufficient and appropriate gatekeeping mechanism."¹²¹ In *Cline*, the difference in analysis between the majority and the dissenting opinions rested on whether imposing a standard of reasonable care on a landowner flowed logically from the common law and the Hawaii Rule, as adopted by Virginia.¹²² At issue was whether liability should be imposed on a landowner

116. *Smith v. Holt*, 5 S.E.2d 492, 495 (Va. 1939) *overruled by Fancher*, 650 S.E.2d at 522.

117. Daniel J. Wisniewski, *Vegetation as a Nuisance*, 8 J.L. ECON. & POL'Y 931, 938 (2012) (citing *Cannon v. Dunn*, 700 P.2d 502, 504 (Ariz. Ct. App. 1985) (noting that Arizona is the only state that follows the Virginia Rule)).

118. *Melnick v. C.S.X. Corp.*, 540 A.2d 1133, 1138 (Md. 1988).

119. *See Fancher*, 650 S.E.2d at 522 (explaining that determining whether a plant is noxious is subjective). An equally interesting discussion is whether a tree could be characterized as an aesthetic nuisance. *See* George P. Smith II & Griffin W. Fernandez, *The Price of Beauty: An Economic Approach to Aesthetic Nuisance*, 15 HARV. ENVTL. L. REV. 53, 6669 (1991) (describing an aesthetic nuisance as an unreasonable aesthetic land condition that interferes with another's use and enjoyment of his own land). Here, the relevant inquiry would be whether a dying tree could offend the senses such that it may be appropriately characterized as an aesthetic nuisance. *See id.* at 72 (citing Raymond Robert Coletta, *The Case for Aesthetic Nuisance: Rethinking Traditional Judicial Attitudes*, 48 OHIO ST. L.J. 141, 161 (1987)) (framing the appropriate inquiry in aesthetic nuisance actions). Although aesthetic nuisance is beyond the scope of this Comment, it is important to consider the need for a workable, objective test in determining whether a landowner's use of his or her land was reasonable. *See id.* at 67, 69 (discussing the importance of employing an objective standard to determine reasonable land use).

120. *See Lane v. W.J. Curry & Sons*, 92 S.W.3d 355, 363 (Tenn. 2002) (contrasting the Hawaii Rule with the Virginia and Restatement Rules and choosing the former because the Hawaii Rule is not premised upon impractical distinctions that put courts in the "position of having to ascertain the origin of a particular tree or other vegetation"). The *Lane* court also determined that landowners who let their property "run wild" should not be shielded from liability, while those who take care of their land are subjected to it. *Id.*

121. *Id.*

122. *Compare Cline v. Dunlora South, LLC*, 726 S.E.2d 14, 17 (Va. 2012) *with id.* at 21 (Lemons, J., dissenting).

for unreasonable land use that posed a threat of harm to persons on adjoining land or highways.¹²³

B. The Majority Opinion in Cline: Limiting Liability Under the Hawaii Rule

In *Cline*, the Virginia Supreme Court was charged with determining whether recovery was permitted for personal injuries caused by “a tree falling from private land onto a vehicle travelling on a public highway.”¹²⁴ The majority approached the issue as a question of whether the Hawaii Rule, adopted by Virginia courts in *Fancher v. Fagella*, should be extended to cover personal injuries.¹²⁵ The court concluded that the principles governing liability for harm caused to property by encroaching vegetation did not apply to personal injury, and therefore expressly declined to extend the rule.¹²⁶

The majority asserted that the Hawaii Rule is limited to nuisance actions “caused by the encroachment of vegetation onto adjoining improved lands.”¹²⁷ The court characterized the duties arising from the Hawaii Rule as “dramatically different” than those needed to support a personal injury suit.¹²⁸ The court explained that the *Fancher* line of precedent did not warrant imposing a duty on “a landowner to inspect and cut down sickly trees that have the possibility of falling on a public roadway and inflicting injury.”¹²⁹ The court saw a significant distinction between imposing liability for failures to maintain a tree that poses a threat of imminent harm, and failure to carefully and consistently inspect one’s property for potentially decrepit trees.¹³⁰

The *Cline* majority strongly emphasized the public nature of the highway on which the plaintiff was driving and determined that the public entity controlling the highway should bear the cost of maintaining and improving it.¹³¹ Further, the majority explained that the only duty a landowner owes to persons traveling on a public roadway that abuts their land, “is to refrain from

123. *Id.* at 18 (majority opinion).

124. *Id.* at 15.

125. *Id.* at 17.

126. *Id.* at 17–18. The court thoroughly evaluated Virginia precedent in reading this conclusion. *Id.* at 16–18 (citations omitted).

127. *Id.* at 17 (citing *Fancher v. Fagella*, 650 S.E.2d 519, 523 (Va. 2007)).

128. *Id.*

129. *Id.* (emphasis added). The majority noted that the category of actions exposed to liability under *Fancher* was intentionally narrow, emphasizing that the court “expressly stated that ‘[i]t would be clearly unreasonable to impose [a duty to protect a neighbor’s land from damage caused by intruding tree branches and roots].’” *Id.* at 17 n.5 (citing *Fancher*, 650 S.E.2d at 523).

130. *Id.* at 17–18.

131. *Id.* at 18 (quoting *Price v. Travis*, 140 S.E. 644, 646 (Va. 1927) (noting that it is a “well settled” matter of law that the state entity in charge of public roadways undertake any affirmative actions to preserve the roadway, while private citizens need only refrain from creating dangerous situations on the roadway that would not otherwise occur in nature)).

engaging in any act that makes the highway more dangerous than in a state of nature or in the state in which it has been left.”¹³²

The majority refused to apply the principles governing encroaching vegetation cases, and instead imposed a more onerous standard requiring plaintiffs to show that a landowner’s negligent land use caused their personal injuries.¹³³ This holding was opposed by three dissenting judges.¹³⁴

C. *The Dissent in Cline: Crafting a Sic Utere—Based Rule for All Localities*

The dissent in *Cline*, did not view the case as an invitation to extend the encroaching vegetation decisions to cover personal injury.¹³⁵ Rather, the dissent viewed *Fancher* and the other encroaching vegetation decisions as part of a trajectory in Virginia case law that decided property tort decisions according to the *sic utere* paradigm.¹³⁶ Justice Lemons wrote that, “[in] [c]onsidering Virginia precedent and applying the common law principle of *sic utere* to the question of first impression presented in this matter, we should recognize that principles of ordinary negligence apply to natural conditions on land.”¹³⁷

The dissent surveyed the various approaches to assigning liability in cases involving vegetation and concluded that it was most appropriate to impose a general duty of reasonable care on landowners.¹³⁸ Justice Lemons explained that this approach was consistent with *sic utere*.¹³⁹ Applying the principle of *sic utere* to the facts of the case, the dissent in *Cline* argued that landowners should be subject to liability when they have actual or constructive notice of dead or decaying trees on their property and unreasonably fail to maintain them.¹⁴⁰

According to the dissent, courts should use a constructive notice test that involves a fact-specific inquiry considering various factors established by

132. *Id.* (citing *Price*, 140 S.E. at 646).

133. *Id.* (noting, by negative implication, that a plaintiff in Virginia is required to show that the defendant engaged in some affirmative act of negligence in order to incur liability).

134. *Id.* at 18, 21 (Lemons, J., dissenting). Justices Mims and Powell also joined Justice Lemons in his dissenting opinion. *Id.* at 18.

135. *Id.* at 18, 21.

136. *Id.* at 19.

137. *Id.*

138. *Id.* at 2021 (recognizing a reasonable duty of care in light of the nexus between the various liability approaches and traditional negligence principles).

139. *Id.* at 19 (“The principle of *sic utere* precludes negligent use of land so as to injure the property of another.”).

140. *Id.* at 21. The difference between actual and constructive notice is that actual notice must be given individually in a specific way, whereas constructive notice results from public acts so obvious that courts presume that owners have taken notice. See *Thomas v. Flint*, 81 N.W. 936, 944–45 (Mich. 1900).

previous decisions.¹⁴¹ As applied to cases involving negligently maintained trees, the test for constructive notice is whether a particular defendant should have known that the tree in question posed a threat of imminent harm to persons on public highways or adjoining land.¹⁴² The advantage of using a constructive notice test is that it broadens the scope of the judge's inquiry beyond whether the tree is noxious, or the land is urban or rural, allowing judges to look at the facts attendant to the suit in determining whether the landowner's conduct was reasonable.¹⁴³

III. TO AVOID DIFFICULT DISTINCTIONS COURTS SHOULD RELY ON THE DOCTRINE OF SIC UTERE

The strength of the dissent's argument in *Cline* hinges on the simplicity with which the common-law doctrine of *sic utere* determines what constitutes reasonable use, and the importance of a constructive notice exception to the general negligence standard for landowners. The rule laid out in the dissent in *Cline* would avoid the rigid dichotomies expressed in other rules, which have been found unworkable by courts.¹⁴⁴

In future cases involving personal injury suits arising from alleged negligent maintenance of dead or decaying trees, courts should look to the rule

141. *Cline*, 726 S.E.2d at 21 (holding that courts should differentiate between "rural and historically agricultural or forested tracts of land" and "single lot[s] in an unforested urban area" and should consider the following factors "including the character of the land, the nature and frequency of the landowner's use, the outward appearance of the tree, and whether persons noticed and notified the owner of the condition of the tree").

142. See LOUIS A. LEHR, JR., 2 PREMISES LIABILITY § 36:6, at 3611 (3d ed. 2012) (explaining that in order for there to be constructive notice, "a defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit the landowner or its employees to discover and remedy it.") (citations omitted).

143. See *Cline*, 726 S.E.2d at 20 n.4 (citing *Wallen v. Riverside Sports Ctr.*, 618 S.E.2d 858, 861 (N.C. Ct. App. 2005)) (stating that courts are moving away from "rigid urban-rural analysis" and instead analyzing "attendant circumstances"). Implicit in this rule is an analysis that seeks to minimize waste. See *supra* note 103. Smith argues that courts analyzing nuisance claims under the *sic utere* doctrine conduct an inherent cost-benefit analysis, which results in economic efficiency. Smith, *Nuisance Law*, *supra* note 15 at 680–81, 699–700. Another added benefit of the *Cline* dissent's rule is that it addresses the concern that landowners who negligently maintain their trees unduly benefit by pushing the costs of maintaining their trees onto plaintiffs or the legal system. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 72 (7th ed. 2007) (explaining that incompatible land use is often discussed in terms of externalities because the costs imposed by one landowner onto another are not accounted for by the initial landowner in coming to its decision). In the case of encroaching vegetation, if the negligent landowner is able to avoid liability for imposing his costs on his neighbor, the cost of his or her unreasonable land use will not become part of his decisionmaking process. Giuseppe Dari-Mattiacci, *Negative Liability*, 38 J. LEGAL STUD. 21, 22–23 (2009) (describing how tort liability causes parties to internalize costs that would otherwise be external to their decisionmaking process); see also Harold Demsetz, *Toward a Theory of Property Rights*, 57 AMER. ECON. REV. 347, 350 (1967) (contending that property rights develop as landowners are forced to internalize negative externalities).

144. See *Cline*, 72 S.E.2d at 21.

elucidated by the *Cline* dissent. The dissent correctly recognizes that landowners must be held to the same reasonableness standards inherent in the *sic utere* doctrine thereby creating an economically efficient outcome and minimizing waste.¹⁴⁵ The common law principle of *sic utere* requires that landowners be precluded from negligently maintaining trees on their land which pose a threat to adjoining landowners or motorists on public highways.¹⁴⁶

The most important justification for this rule stems from the *sic utere* doctrine, which espouses the principle that a landowner has broad authority to do as they wish with their land, so long as they do not injure any other person.¹⁴⁷ Interpretations of this maxim have prohibited everything from negligently maintaining a reservoir on one's land—*apropos* to the issue in *Cline*—to allowing hazardous banyan trees to overhang an adjoining landowner's property.¹⁴⁸ This rule is reflected in the Restatement (Second) of Torts, which imposes liability on landowners who fail to exercise "reasonable care to prevent an unreasonable risk of harm arising from the condition of trees on the land near the highway."¹⁴⁹

Courts that deal with encroaching vegetation endeavor to strike the proper economic and social balance in determining what is "reasonable" under the dictate of *sic utere*.¹⁵⁰ In striking a balance, some courts have drawn narrow and unworkable distinctions based on the nature of the defendant's land to determine whether something is *per se* unreasonable.¹⁵¹ For example, the Restatement Rule draws an archaic distinction between land located in rural and urban areas, imposing a duty of reasonable care only for landowners located in urban areas.¹⁵² The English common-law approach is similarly unworkable. The English approach attempts to draw a line between natural and artificial conditions, imposing liability for unreasonable land use only

145. See *id.* at 19.

146. See *id.* at 17 (majority opinion) ("The principle of *sic utere* precludes use of land so as to injure the property of another."); see also *Keys v. Romley*, 412 P.2d 529, 537 (Cal. 1966) (holding in the context of riparian owners that "[i]t is therefore incumbent upon every person to take reasonable care in using his property to avoid injury to adjacent property"); see also *supra* note 143 and accompanying text (explaining that reasonable use is inherent in the *sic utere* maxim).

147. See *Cline*, 726 S.E.2d at 17.

148. See *Fletcher v. Rylands* (1866) 1 L.R. Exch. 265 at 269 (Eng.); *Whitesell v. Houlton*, 632 P.2d 1077, 1078 (Haw. Ct. App. 1981).

149. RESTATEMENT (SECOND) OF TORTS § 363(2) (1965).

150. See *supra* Part I.A-E.

151. See *supra* Part I.A-E (providing extensive background on the case law concerning land use and vegetation grown on private land).

152. See RESTATEMENT (SECOND) OF TORTS § 363 (1965) (noting, however, the caveat that, "[t]he Institute expresses no opinion as to whether the rule stated in Subsection (2) may not apply to the possessor of land in a rural area").

when the condition at issue is artificial.¹⁵³ Likewise, the Virginia Rule draws an unworkable distinction based on whether the vegetation in question is noxious, holding that a landowner is *only* liable for damages if the tree in question is noxious.¹⁵⁴ These unworkable distinctions are then complicated by the approaches that hold that courts should *never* intervene in encroaching vegetation cases, thereby restricting the remedy available to aggrieved landowners to self-help.¹⁵⁵ Equally impractical is the majority rule in *Cline*. The *Cline* rule only requires a landowner to refrain from making a natural condition more dangerous than it would otherwise be, thereby putting the onus on the state to take affirmative action with respect to highways.¹⁵⁶

Each of these approaches is unworkable and is based on the assumption that the value of a bright-line rule outweighs the value of a rule consistent with the doctrine of *sic utere*.¹⁵⁷ The beauty of *sic utere* is in its simplicity. The doctrine dictates that landowners may do as they please with their land so long as they do not injure their neighbor.¹⁵⁸ In other words, landowners must only be reasonable in their land use. But *sic utere* does not determine what is reasonable; that is a job that is regularly entrusted to courts.¹⁵⁹ Implicit in the *Cline* dissent is the prudent realization that rules that determine *ex ante* what is unreasonable are less workable and less equitable than the general principle of

153. See *supra* note 25 and accompanying text.

154. See *Smith v. Holt*, 5 S.E.2d 492, 495 (Va. 1939) (restricting liability to only those situations where the encroaching vegetation is noxious), *overruled by* *Fancher v. Fagella*, 650 S.E.2d 519 (Va. 2007).

155. See *Michalson v. Nutting*, 175 N.E. 490, 490–91 (Mass. 1931) (restricting the plaintiff's remedy in encroaching vegetation to self-help).

156. See *Cline v. Dunlora South, LLC*, 726 S.E.2d 14, 18 (Va. 2012) (emphasizing that landlords have a duty to “refrain from engaging in any act that makes the highway more dangerous than in a state of nature or in the state in which it has been left”).

157. See *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 447 (1989) (Stevens, J., concurring)(arguing against the utility of bright-line rules and instead recognizing the benefit of a more flexible doctrine, Justice Stevens wrote, “[a]ny difficulty courts may encounter in drawing [a bright line rule] simply reflects that the factual predicate to these cases is itself complicated”).

158. See *Smith*, 5 S.E.2d at 495.

159. See RESTATEMENT (SECOND) OF TORTS § 826(a) (1979). In private nuisance suits, for instance, courts are often guided by the Restatement's fact-specific balancing test. See *id.* (stating that the test for determining reasonableness in a private nuisance suit is whether the gravity of the defendant's harm as against the plaintiff outweighs the social utility of the defendant's conduct); see also *id.* at § 827 (listing as factors for evaluating the gravity of the harm caused by the defendant: “(a) The extent of the harm involved; (b) the character of the harm involved; (c) the social value that the law attaches to the type of use or enjoyment invaded; (d) the suitability of the particular use or enjoyment invaded to the character of the locality; and (e) the burden on the person harmed of avoiding the harm.”); *id.* § 828 (enumerating the following factors to be considered in determining the social utility of the defendant's conduct: “(a) the social value that the law attaches to the primary purpose of the conduct; (b) the suitability of the conduct to the character of the locality; and (c) the impracticability of preventing or avoiding the invasion”).

negligence—reasonable care—which is at the heart of *sic utere*.¹⁶⁰ The general principle of negligence inherently weighs the actions of the particular defendant in the particular case and assigns liability accordingly.¹⁶¹

The standard proposed by the dissent in *Cline* is that landowners must exercise reasonable care with regard to their trees that abut public highways and are subject to liability when they actually know, or should know, of an unsafe condition posed by a tree.¹⁶² This fact-specific inquiry properly assesses what was reasonable under the circumstances.¹⁶³

IV. CONCLUSION

In determining when a landowner is bound by the duty of reasonable care with respect to his vegetation, courts in the future should be guided by the dissent in *Cline v. Dunlora South, LLC*, and should impose a general negligence standard on landowners. Landowners should be subject to liability when they know, or should know, that a tree on their property poses an imminent harm to an adjacent landowner or a motorist on a public highway that abuts the landowner's land.

In *Cline*, the Virginia Supreme Court examined the tension inherent in negligence suits brought against landowners for injury caused by the landowner's tree. At the heart of these disputes is the age-old maxim of *sic utere*, which states that a landowner may use his land however he wants, provided he does not injure others. Implicit in this standard is the idea of reasonable land use. For over two hundred years, courts have struggled with

160. See *Cline*, 726 S.E.2d at 21 (noting that the fact-specific nature of the judicial task necessitates a flexible, nuanced principle of law).

161. Smith, *Nuisance Law*, *supra* note 15, at 664–65 (arguing, in the context of examining nuisance law, that *sic utere* inherently incorporates a necessary balancing test, which results in the best outcome from an economic perspective). Smith asserts that *sic utere* presents a framework that inherently determines whether conduct is unreasonable and that this framework is fact-specific enough to weigh the social interests and costs generated by behavior. *Id.* at 680. Similarly, Smith has highlighted the use of the *sic utere* doctrine in establishing a reasonableness standard through the development of early English and American common law nuisance suits. Smith, *Re-Validating the Doctrine*, *supra* note 53, at 690 (contending that Aldred's Case, the first case that established *sic utere* as part of the English common law, was “[where] the first attempt of a judicial balancing of interests or harms or utilities was undertaken” and that “the undergirding centrality and the flexibility of the maxim” is reasonableness).

162. See *Cline*, 126 S.E.2d at 18–21 (Lemons, J., dissenting).

163. This rule would also advance the dual goals of tort law: compensation and deterrence. See Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Klaven, Jr.*, 43 U. CHI. L. REV. 69, 73–91 (1975) (asserting that the dual goals of tort law are compensation and deterrence). In lowering the bar to recovery for plaintiffs who have been injured severely by the carelessness of a landowner, the goal of compensation is advanced because it increases the available sources for recovery. Further, by punishing conduct which is *unreasonable* the courts will deter other landowners from growing negligently dangerous trees on their property—especially when said property abuts public and private right-of-ways.

determining what constitutes reasonable land use, especially when it concerns natural conditions on the land.

Jurisprudence in this field redounds with inconsistent and unworkable rules that rely on judicially-created dichotomies. These early attempts at bright line distinctions have been unsuccessful because they have tried to allocate responsibility *ex ante* without considering what is truly reasonable under the circumstances. A one-size-fits-all, bright-line rule does not accurately allocate liability in all cases. Courts should instead employ a rule that balances common law principles with the unique facts of each case in order to correctly allocate liability between parties, provide injured plaintiffs with avenues for compensation, and minimize waste and negative externalities.

The *Cline* dissent properly resolved the dispute at issue by considering both the common-law origins of property and tort law—the doctrine of *sic utere*—and by allowing for a constructive notice of hazardous conditions, which allows judges to make fact-specific determinations about whether a given defendant acted reasonably under the circumstances. Courts should look to the dissent in *Cline* for guidance in resolving the difficult issues of land use broached by encroaching vegetation cases.